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"AFFIDAVITS OF PREJUDICE" IN FEDERAL COURTS ARE CONCLUSIVE.

An affidavit of prejudice in the federal court appears to be equivalent to a peremptory challenge of the judge's right to try the case. Berger v. United States, 41 Sup. Ct. 230.

In this case an affivadit had been filed in the trial court alleging that the trial judge (Landis) was prejudiced against citizens of German parentage, including defendants. The affidavit alleged that the judge had said publicly that "the hearts of Germans in this country are reeking with disloyalty." Judge Landis denied that he had such prejudice against German citizens generally or that he made the statement contained in the affidavit, and he filed as a part of the record in the case a transcript of his exact words in the speech referred to in the affidavit. He then overruled the motion for the assignment of another judge to preside in that particular case. At the trial subsequently ensuing defendants were convicted. The United States Circuit Court of Appeals to which the case had been taken for review submitted the issue to the Supreme Court whether Judge Landis had the right to pass on the truth of the facts stated in affidavit or whether he should have disqualified himself without regard to the truth of the affidavit, immediately upon the filing thereof in his court. The Supreme Court answered that Judge Landis had no right to pass on the truth of the affidavit or to preside at the trial. On the point the Court said:

"We are of opinion that an affidavit upon information and belief satisfies the section and that upon its filing, if it show the objectional inclination or disposition of the judge, which we have said is an essential condition, it is his duty to 'proceed no further' in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside, and any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than ten days before the commencement of the term."

It seems to us that this decision not only places the federal judges in a humiliating position but also fails to give effect to the careful expressions used by Congress to protect the federal courts from imposition as well as the defendant from prejudice. Here is section 21 of the Judiciary Code:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, * * * No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

This section clearly states that an affidavit of prejudice shall allege "facts." If the affidavit should set out as a fact a quotation from a judge's speech on a certain occasion and the judge is able to show by a stenographic copy of the speech that the quotation is incorrect and that he did not say the thing he is alleged to have said, the affidavit is clearly insufficient. If this is not true why should the affidavit set out the "facts?" Why not simply allege the prejudice of the judge on information or belief without setting out the facts on

which the applicant bases his allegation of prejudice. On this point we are inclined to agree with Justice McReynolds in his dissenting opinion when he says:

"I am unable to follow the reasoning of the opinion approved by the majority or to feel fairly certain of its scope and consequence. If an admitted anarchist, charged with murder, should affirm an existing prejudice against himself and specify that the judge had made certain depreciatory remarks concerning all anarchists, what would be the result? Suppose official stenographic notes or other clear evidence should demonstrate the falsity of an affidavit, would it be necessary for the judge to retire? And what should be done if dreams or visions were the basis of an alleged belief?

"The conclusion announced gives effect to the statute which seems unwarranted by its terms and beyond the probable intent of Congress. Bias and prejudice are synonymous words and denote 'an opinion or leaning adverse to anything without just grounds or before sufficient knowledge'—a state of mind. The statute relates only to adverse opinion or leaning towards an individual and has no application to the appraisement of a class; e. g., revolutionists, assassins, traitors."

Of course, no judge should preside at a trial if he entertains any prejudice against either party or his cause. It is the custom of judges in jurisdictions where a general affidavit of prejudice is sufficient to send the case at once to another judge. But where the affidavit requires the affiant to set out "actual statements or acts" of the judge which it is alleged, indicate that the particular judge is prejudiced against the affiant, the judge should be permitted to deny the truth of the so called facts which, if allowed to stand, might detract from his standing as a judge and as a citizen. If the facts required to be stated in such affidavits cannot be controverted by the judge, no matter how untrue, ridiculous or libelous they may be, then for the sake of the honor of our judges, let this requirement be stricken out of the Judicial Code and a general affidavit of prejudice be regarded as sufficient.

NOTES OF IMPORTANT DECISIONS.

SECONDARY BOYCOTTS ILLEGAL.—It is reassuring to men of common sense and patriotism to read the decision of the Supreme Court that the Clayton Act with all its unwise restrictions on the power of the courts to issue the writ of injunction in labor disputes does not legalize the secondary boycott. Duplex Printing Press Co., vs. Deering, 41 Sup. Ct. 172.

In the Deering case the plaintiff sought to restrain persons, not in its employ, from threatening its customers with strikes unless they refrained from trading with plaintiff. It seems that plaintiff's offense was the decision to conduct its business in Battle Creek, Mich., on the "open shop" principle. The defendants are not plaintiffs' employees but are officers of a labor union known as the International Association of Machinists with headquarters in New York City. The defendants sought to compel plaintiffs to "unionize" their factory not by inducing their employees to quit work but by inducing the employees of its customers to quit work unless they refrained from buying their presses from plaintiff. This is a pure and simple secondary boycott which is authoritatively defined by the Court as signifying a "combination not merely to refrain from dealing with a person, or to advise or by peaceful means persuade his customers to refrain, but to exercise coercive pressure on such customers, actual or prospective, in order to cause them to withhold or withdraw their patronage, through fear of loss or damage to themselves."

There can be no doubt that such a boycott as set forth in this case constituted an interference with interstate commerce and was illegal unless the Clayton Act (Sec. 20) made such boycott legal. Sec. 20 provides as follows:

"Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employes, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

In holding that this section does not justify the secondary boycott, the Court shows that this section is confined to "a case between an employer and employees" and does not apply to disputes with others not in its employ. Continuing its argument on this point, the Court said:

"The majority of the Circuit Court of Appeals appear to have entertained the view that the words "employers and employees," as used in section 20, should be treated as referring to "the business class or clan to which the parties litigant respectively belong," and that, as there had been a dispute at complainant's factory in Michigan concerning the conditions of employment there—a dispute created, it is said, if it did not exist before, by the act of the Machinists' Union in calling a strike at the factory—section 20 operated to permit members of the Machinists' Union elsewhere, some 60,000 in number, although standing in no relation of employment under complainant, past, present, or prospective, to make that dispute their own and proceed to instigate sympathetic strikes, picketing, and boycotting against employers wholly unconnected with complainant's factory and having relations with complainant only in the way of purchasing its product in the ordinary course of interstate commerce, and this was where there was no dispute between such employers and their employes respecting terms or conditions of employment.

"We deem this construction altogether inadmissible. Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States and upon the general operation of the anti-trust laws, a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it. Full and fair effect will be given to every word if the exceptional privilege be confined—as the natural meaning of the words confines it—to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or condition of their own employment, past, present, or prospective. The extensive construction adopted by the majority of the court below virtually ignores the effect of the qualifying words. Congress had in mind particular industrial controversies, not a general class war. "Terms or conditions of employment" are the only grounds of dispute recognized as adequate to bring into play the exemptions; and it would do violence to the guarded language employed were the exemption extended beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of dispute."

Justices Holmes and Clarke joined Justice Brandeis in the latter's dissenting opinion filed in this case. An interesting part of Justice Brandeis' opinion is his review of the development of the law of conspiracy in labor cases. On this point Justice Brandeis says:

"The change in the law by which strikes once illegal and even criminal are now recognized as lawful was effected in America largely without the intervention of legislation. This reversal of a common-law rule was not due to the rejection by the courts of one principle and the adoption in its stead of another, but to a better realization of the facts of industrial life. It is conceded that, although the strike of the workmen in plaintiff's factory injured its business, the strike was not an actionable wrong; because the obvious self-interest of the strikers constituted a justification. See Picket v. Walsh, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638. Formerly courts held that self-interest could not be so served. Commons, History of Labor in the United States, vol. 2, c. 5. But even after strikes to raise wages or reduce hours were held to be legal because of the self-interest, some courts held that there was not sufficient causal relationship between a strike to unionize a shop and the self-interest of the strikers to justify injuries inflicted. Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; Lucke v. Clothing Cutters' Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; Erdman v. Mitchell, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. Rep. 783. But other courts, repeating the same legal formula, found that there was justification, because they viewed the facts differently. National Protective Ass'n v. Cumming, 170 N. Y. 315, 63 N. E. 369,

58 L. R. A. 135, 88 Am. St. Rep. 648; Kemp v. Division No. 241, 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347; Roddy v. United Mine Workers, 41 Okl. 621, 139 Pac. 126, L. R. A. 1915D, 789.

"When centralization in the control of business brought its corresponding centralization in the organization of workingmen, new facts had to be appraised. A single employer might, as in this case, threaten the standing of the whole organization and the standards of all its members; and when he did so the union, in order to protect itself, would naturally refuse to work on his materials wherever found. When such a situation was first presented to the courts, judges concluded that the intervention of the purchaser of the materials established an insulation through which the direct relationship of the employer and the workingmen did not penetrate; and the strike against the material was considered a strike against the purchaser by unaffected third parties. Burnham v. Dowd, 217 Mass. 351, 104 N. E. 841, 51 L. R. A. (N. S.) 778; Purvis v. United Brotherhood, 214 Pa. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275; Booth v. Burgess, 72 N. J. Eq. 181, 65 Atl. 226. But other courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself. Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661; Cohn & Roth Electric Co. v. Bricklayers, 92 Conn. 161, 101 Atl. 659, 6 A. L. R. 887; Gill Engraving Co. v. Doerr (D. C.) 214 Fed. 111; State v. Van Pelt, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760, 1 Ann. Cas. 495; Grant Construction Co. v. St. Paul Building Trades, 136 Minn. 167, 161 N. W. 520, 1055; Pierce v. Stablemen's Union, 156 Cal. 70, 76, 103 Pac. 324.

"So, in the case at bar, deciding a question of fact upon the evidence introduced and matters of common knowledge, I should say, as the two lower courts apparently have said, that the defendants and those from whom they sought co-operation have a common interest which the plaintiff threatened."

This decision will do much to set some reasonable limits on the growth of the labor union idea and preserve the property of employers who do not see fit to unionize their factory. The pendulum of public opinion always swings to one extreme before it turns back to swing in the other direction. That extreme has been reached. Labor has been given, as Justice Brandeis shows, a great extension of its privileges and rights under the law until it has power which enables the union workingman to compete on equal terms with his employer. To this extent the public, we believe, is in hearty sympathy with the changes that have been made in the law. But to go farther and legalize the secondary boycott would not only be unjust to employers but detrimental to the public welfare. The law cannot afford to give such great power to large combinations of workingmen without placing the business interests of the country in the greatest jeopardy.

THE DOMICILE OF AN INFANT—I—WHILE THE INFANT'S FATHER IS ALIVE.*

The domicile of a person is of importance in the Anglo-American system of law, because of the number of things which are connected with it. Domicile determines the national character of a person, his status, his eligibility to office, his right to vote, and his control of movable property. In addition, legitimacy and legitimation, adoption, paternal powers, guardianship, minority and majority, capacity, intestate succession, testamentary succession, validity of wills, rights in community property that is movable, jurisdiction for divorce, settlement under poor laws, legacy and inheritance taxes, pauper settlements, probate and administration, and homestead exemptions, all are determined by reference to the domicile of the person concerned.[1] The domicile of an infant is connected with five of his relationships:

1. His relations with his father.
2. His relations with his mother, after the death of his father.
3. His relations with his next of kin on the decease of one or both parents.
4. His relations with his guardians.
5. His relations with the State as a juristic person.

The decided cases, so far as the researches of the writer go, indicate thirty types of situations connected with these relation-

*This is Part I of a thorough analysis of the subject of the Domicile of An Infant prepared by our Associate Editor, Albert Levitt, of the George Washington University. Part II will appear next week and will discuss the subject of Domicile of the Infant—After the Father's Death.—Ed.

(1) For a thorough discussion of this matter see Jacobs on Domicile, Chap. 2; and Wharton, Conflict of Laws, 3rd Ed., page 77.

ships. It is the purpose of this article to indicate what these situations are, what the law governing the domicile of the infant within them is, and the reasons for the law being what it is.

Every person must have a domicile somewhere.[2] The reason is that every person as soon as he is born must come under the control of some legal order; he must be sub judice; he cannot be outside the law. Says Prof. Beale: "It is unthinkable in a civilized country that any act should fall outside the domain of law. If law be regarded as command, then every act done must either be permitted or forbidden. If law be regarded as a right-producing principle, then every act must be in accordance with the law change or not change existing rights."[3] In Swift v. Philadelphia and Reading Railroad,[4] Judge Grosscup said: "No plain or valley, no nook or corner, to which the dominion of man has extended itself, is without some law of the land. Indeed, law is the breath of dominion." This social control of the individual and his acts is necessary, for without it each man is his own judge and the determiner of his own acts, which means anarchy,[5] and a retrogression to the most primitive stages of legal development.[6] The domicile of the individual determines which factor or element of a legal system is to indicate and control certain of his rights, duties and powers. It is a delimiting thing. It indicates which legal principles shall apply to given acts or omissions, and excludes other principles of law from acting upon these omissions or acts. This is true when domicile is looked at from its *functional* standpoint; when we ask: What is the purpose, in our legal system, of domicile? Looked at from what we may call the spatial standpoint, the domicile of a person is that spot within the territory of his sovereign to which the legal system of that sovereign looks for the principles which are to govern that person's dealings along certain lines. Westlake says, concerning this: "In Christendom each civil society is now a territorial one. . . . And within Christendom every person is a member of that civil society in the territory of which he is domiciled."[7] Or, as Dicey put it, "For the purpose of determining a person's legal rights or liabilities, the courts will invariably hold that there is some country in which he has a home, and will not admit the possibility of his being in fact homeless, or, in other words, even if he is in fact homeless, a home will, for the purpose of determining

(2) Holmes v. Oregon Railroad Co., 5 Fed. 523; White v. Brown, 29 F. Cas. No. 17,538; State v. Hallett, 8 Ala. 159; New Haven First National Bank v. Balcom, 35 Conn. 351; Welsh v. Shumway, 232 Ill. 54, 83 N. E. 549; People v. Moir, 207 Ill. 180, 69 N. E. 905; Cooper v. Beers, 143 Ill. 25, 33 N. E. 61; Schmoll v. Schenck, 40 Ind. A. 581, 82 N. E. 805; Barhydt v. Cross, 156 Iowa 271, 136 N. W. 525; In re Titerington, 130 Iowa 356, 106 N. W. 761; Ashland v. Cattletsburg, 172 Ky. 365, 189 S. W. 454; Graves v. Georgetown, 154 Ky. 207, 157 S. W. 303; Boyd v. Comm., 149 Ky. 764, 149 S. W. 1022; Helm v. Comm., 135 Ky. 392, 122 S. W. 196. Erwin v. Benton, 120 Ky. 536, 87 S. W. 291; Lebanon v. Biggers, 117 Ky. 430, 78 S. W. 213; Louisville R. R. v. Kimborough, 115 Ky. 512, 74 S. W. 229; Tipton v. Tipton, 87 Ky. 243, 8 S. W. 440; Holyoke v. Holyoke, 110 Me. 469, 87 A. 40; Whately v. Hatfield, 196 Mass. 393, 82 N. E. 248; Borland v. Boston, 132 Mass. 89; Shaw v. Shaw, 98 Mass. 158; Otis v. Boston, 12 Cush. 44; McDaniel v. King, 5 Cush. 474; Opinion of Judges, 5 Metcalf 587; Thorndike v. Boston, 1 Metcalf 242 (Mass.); Abington v. North Bridgewater, 23 Pick. 170; Morgan v. Nunes, 54 Miss. 308; Young v. State, 74 Neb. 346, 104 N. W. 867; DeMeli v. DeMeli, 120 N. Y. 485, 54 N. E. 996; Matter of Rooney, 159 N. Y. S. 132; U. S. Trust Co. v. Hart, 135 N. Y. S. 81; Douglas v. N. Y., 9 N. Y. Super. 110; Matter of Bye, 2 Daly 525; Von Hoffman v. Ward, 4 Redfield Surrogate 244; State v. Kuhn, 11 Oh. S. & C. P. 321, 8 Oh. N. P. 197; Pickering v. Winch, 48 Ore. 500, 87 P. 763; Keelin v. Graves, 129 Tenn. 103, 165 S. W. 232; Marsden v. Troy, 189 S. W. (Tex.) 960; Brown v. Beckwith, 58 W. Va. 140, 51 S. E. 977; Seibold v. Wahl, 164 Wisconsin 82, 159 N. W. 546; Miller v. Sovereign Camp Workmen of the World, 140 Wis. 505, 122 N. W. 1126; Wadsworth v. McCord, 12 Canadian S. C. 466; Wanzer Lamp Co. v. Woods, 13 Ont. Pr. 511, 513. Dicey, Conflict of Laws, Ch. 2, Rule 2; Jacobs on Domicile, page 164; Story, Conflict of Laws, 8th Ed., p. 47; Wharton, Conflict of Laws, Vol. 1, p. 90 et seq.

(3) J. H. Beale, Treatise on the Conflict of Laws, Part 1, page 154.

(4) 64 Fed. 59.

(5) Beale, Treatise on the Conflict of Laws, page 154.

(6) Roscoe Pound, The End of Law as Developed in Legal Rules and Doctrines, 27 Harvard Law Rev. 195, 198 et seq.

(7) Westlake, Private International Law, 4th Ed., page 311

his legal rights, or those of other persons, always be assigned to him by a presumption or fiction of law."[8] Here Mr. Dicey combines both the functional and the spatial aspect of domicile, and in addition, when he speaks of domicile as assigned "by . . . a fiction of the law" he is presenting the conceptual view of domicile. That is domicile is "an idea of the law." Here he follows the famous pronouncement of Lord Westbury, who said: "It is necessary in the administration of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of the domicile. Domicile therefore is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place."[9] These three aspects of domicile, the functional, the spatial and the conceptual, are indivisible in fact, while the primary and most important aspect is the functional one. The conceptual aspect is merely of philosophical and metaphysical value; the spatial aspect determines where the principle to be applied is to be found, and is of practical importance; but the functional aspect determines whether the principle when found should be applied in the particular instance or not. It gives the reason for the principle.

As an infant is a member of society, his activities and relationships need to be controlled, and he must therefore have a domicile somewhere. As domicile is a relation between a person and a given locality, that locality must be determined by law, and the determination must be made as soon as the child is born, for otherwise there would be a certain extent of time within which the infant is not subject to legal control, which by hypothesis is impossible. This locality can be either the place where the child actually comes into the world at the time of its birth or some other spot. As a child is usually born into a family, which family has a head who is accountable to the State for the proper control of the members of the family, and as the head of the family is under normal circumstances the father of the child,[10] the domicile which the law attaches to the child upon its birth is that of the father. As the technical phrase has it: The domicile of origin is the domicile of the father.

An interesting question arises at this point: *What is the domicile of origin of a posthumous child?* So far as the writer has been able to determine, there is no reported case deciding the point; nor has he found any dictum dealing with the matter. Westlake, in the first edition of his work on Private International Law, suggested that the domicile of origin would be that of the mother, but cited no cases in support of his opinion.[11] In the fourth edition of his work, however, Westlake does not mention the matter at all.[11a] Dicey,[12] and Jacobs,[13] follow Westlake in thinking that the mother gives her domicile to a posthumous child. But Wharton disagrees with this,[14], basing his opinion upon the fact that a mother could by changing her domicile between the time of the death of her hus-

(8) Dicey on the Conflict of Laws, American Edition, page 94.

(9) Bell v. Kennedy (18668), L. R. 1 S. & D. A. 320, L. R. 1 H. L. Sc. 307.

(10) See my article, The Domicile of a Married Woman, 91 Central L. Journal 4, 8.

(11) Westlake, Private International Law, page 35.

(11a) Unless the language on page 323, par. 246, can be made to include this situation. The paragraph reads: "The original domicile of a child born out of wedlock is the domicile of its mother at the time of its birth." I think, however, that Mr. Westlake is referring to illegitimate children and not to posthumous children in this paragraph.

(12) Conflict of Laws, Am. Ed., page 101, Rule 6 (2).

(13) Domicile, par. 105.

(14) Conflict of Laws, 3rd Ed., page 90, note 5.

band and the birth of the child change the law of succession as to such child. But, it is submitted with all due deference, that this objection is not a strong one; for, there is no domicile other than that of the mother to which the child's domicile of origin can be attached with good reason. The father died before the child was in esse. *His* domicile has vanished. The relation between the father and a particular territory is gone, for the party to the relation is gone. The reason for having a domicile is the necessity for controlling the activities and legal relations of the child. This control can come through the state directly or through some one appointed by the state. Our system of law prefers wherever it is possible to put the control of the child in the hands of the mother, when the father is dead, or failing that in the hands of the next of kin. In the instant case, the mother is the natural guardian of the child. She is under a duty to care for it. Her domicile is in existence at the time the child is born, and there is no good reason why her domicile should not be the domicile of origin for the child. Furthermore, as we shall see later, the mother can change the domicile of her minor children, if she does it in good faith,[15] and in so doing she does change the law as to succession as to those children. The answer to Mr. Wharton is that the law permits the very thing to occur which he urges as an objection to the position taken by Mr. Westlake.

The situation sometimes arises where the mother dies during the birth of a posthumous child. In such a case two courses are reasonably open to the law. The first is to fix the domicile of origin as being the place where the child was born, by analogy to the cases of waifs and foundlings, or else to have the domicile of the next of kin to whom the care of the child is given, become the domicile of origin of the child for the same reasons that would attach this domicile to that of the mother. Where the child is still-born no domicile of origin can come into question.

An infant being non sui juris cannot change his domicile.[16] During the lifetime of its father the domicile of an infant follows that of the father, under normal circumstances.[17] This is because the home of

(15) Infra, note 42.

(16) Delaware, etc., R. R. Co., v. Petrowsky, 250 Fed. 554; Marks v. Marks, 75 Fed. 321; Allgood v. Williams, 92 Ala. 551; Landreth v. Henson, 116 Ark. 361, 173 S. W. 427; In re Henning, 128 Cal. 214, 60 Pac. 762; Beekman v. Beekman, 53 Fla. 858, 43 So. 923; Harkins v. Arnold, 46 Ga. 656; Taylor v. Jeter, 33 Ga. 195; Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628; Warren v. Hoffer, 13 Ind. 167; Hiestand v. Kuhns, 8 Blfk. (Ind.) 345; In re Benton, 92 Iowa 202, 60 N. W. 614; Jenkins v. Clark, 71 Iowa 552, 32 N. W. 504; Modern Woodmen of America v. Hester, 66 Kan. 129, 71 P. 279; Boyd v. Comm., 149 Ky. 764, 149 S. W. 1022; Louisville R. R. Co. v. Kimbrough, 115 Ky. 512, 74 S. W. 229; Munday v. Baldwin, 79 Ky. 121; Mennards Succ., 44 La. Ann. 1076, 11 So. 705; Stephens Succ., 19 La. Ann. 499; Powers v. Mortee, 20 Fed. Cas. No. 11,362; Sudler v. Sudler, 121 Md. 46, 88 A. 28; Russell v. State, 62 Neb. 512, 87 N. W. 344; Hess v. Kinball, 79 N. J. Eq. 454, 81 A. 363; Ames v. Duryea, 6 Lans. (N. Y.) 155; Matter of Kiernan, 77 N. Y. S. 924; Ex. p. Dawson, 3 Brad. Surr. (N. Y.) 130; Guier v. O'Daniel, 1 Binn. (Pa.) 349, note; Reitmeyer v. Wolfe, 2 Pa. Dist. 810; Allen v. Thomason, 11 Humph. (Tenn.) 536; Trammell v. Trammell, 20 Tex. 406; Hardy v. DeLeon, 5 Tex. 211; Franks v. Handcocks, 1 Tex. Unreported Cases 554; In re Bunting, 30 Utah 251, 84 P. 109; Mears v. Sinclair, 1 W. Va. 185; Miller v. Sovereign Camp W. W., 140 Wis. 505, 122 N. W. 1126; Jopp v. Wood, 4 DeG. J. & S. 616, 46 Reprint 1057; Forbes v. Forbes, Kay 341, 69 Reprint 145.

(17) See cases in preceding note and these additional cases: Lamar v. Micou, 112 U. S. 452, 28 L. Ed. 751; Bjornquist v. Boston R. R., 250 Fed. 929; Toledo Tract. Co. v. Cameron, 137 Fed 48; Dresser v. Edison Illuminating Co., 49 Fed. 257; In re Chung Toy Ho, 42 Fed. 398; Powers v. Mortee, 19 Fed. Cases No. 11,362; Prentiss v. Barton, 19 Fed. Cases No. 11,384; White v. Brown, 29 Fed. Cas. No. 17,539; Kelley v. Garrett, 67 Ala. 304; Metcalf v. Lowther, 56 Ala. 312; Daniel v. Hill, 52 Ala. 430; Johnson v. Copeland, 35 Ala. 521; Johnson v. Turner, 29 Ark. 280; Grimmett v. Witherington, 16 Ark. 377; In re Vance, 92 Calif. 195, 28 P. 229; Matter of Afflick, 10 D. C. 95; Smith v. Croom, 7 Fla. 81; Jackson v. Southern Flour Co., 146 Ga., 453, 91 S. E. 481; Ilo v. Ramey, 18 Ida. 642, 112 P. 126; Freport v. Stephenson Co., 41 Ill. 495; Peo. v. Board of Education, 206 Ill. App. 381; Maddox v. State, 32 Ind. 111; McCollem v. White, 23 Ind. 43; Wheeler v. Burrow, 18 Ind. 14; Hindorff v. Sovereign Camp, W. W., 150 Iowa 185; Ex. p. McCoun, 96 Kan. 314, 150 P. 516; Shirley v. Burch, 6 Ky. L. 445; Oglesby v. Turner, 127 La. 1093; Winn's Succ., 3 Rob. (La.) 303; Robert's Succ., 2 Rob. (La.) 427; Parsonfield v. Kennebunkport, 4 Me. 47; In re

the infant is normally where the home of the father is, and domicile is closely synonymous with a home.[18] Furthermore, the father is under a duty to care for, and see to the education and development of, the child, and it is fair that the father should be able to take his children where he can best take care of and control them.[19] The domicile of the infant is that of the father, even though the infant may be away from that place of domicile,[20] may be en route to it,[21] or may never have been at that place.[22] That is, given the situation where the father is legally responsible for the care and nurture of the infant, and where this responsibility is fulfilled, the legal home of the infant is the same as the legal home of the father. Thus far the law is clear. But the law is not so clear, nor are the reasons for it quite adequately given by the decided cases, in situations where the father fails to fulfill his obligations, or the law releases him from them for valid reasons. The three usual situations of this character are (a) Where the father abandons the child; (b) where the father emancipates the infant; (c) where the infant marries.

(a) When a father abandons his child the domicile of the child no longer follows the domicile of the father.[23] This is obviously good sense. As the Court well said in People v. Dewey:[24] "By the abandonment of the child and his neglect to support it the relator (father) relinquished his paternal right and thereupon the guardianship of the child devolved upon the mother." That is, the reason for giving the control of the domicile of the infant to the father of the infant being in fact gone, for the father does not carry out his duty of parental care, the rule also goes.

(b) Where the father emancipates the infant the weight of authority is that the infant can acquire a domicile of his own.[25] A long line of decisions beginning with the case of Charlestown v. Boston, decided in 1816, and ending with the case of Bjornquist v. Boston and Albany R. R., decided in 1918, establishes this rule. And there would be no question about it were it not for two recent decisions—one in the state of Texas[26] and the other in the Federal Court

High, 2 Douglas (Mich.) 515; Boyle v. Griffin, 84 Miss. 41, 36 So. 141; Lacy v. Williams, 27 Mo. 280; Smith v. Young, 136 Mo. A. 65, 117 S. W. 628; DeJarnett v. Harper, 45 Mo. A. 415; Lewis v. Castello, 17 Mo. 593; Wirsig v. Scott, 79 Neb. 322, 112 N. W. 655; White v. White, 86 A. 353; Hart v. Lindsey, 17 N. H. 235; In re Russell, 64 N. J. Eq. 313, 53 A. 169; Hervey v. Hervey, 56 N. J. Eq. 156; Blumenthal v. Tannenholz, 31 N. J. Eq. 194; In re Hubbard, 82 N. Y. 90; Kennedy v. Ryall, 67 N. Y. 379; Ludlam v. Ludlam, 26 N. Y. 356; Crawford v. Wilson, 4 Barb. 504; Matter of Rice, 7 Daly (N. Y.) 22; Eaves Costume Co. v. Pratt, 22 N. Y. S. 74; Van Hoffman v. Ward, 4 Redf. Surr. (N. Y.) 244; Exp. Bartlett, 4 Brad. Surr. (N. Y.) 221; Brown v. Lynch, 2 Brad. Surr. (N. Y.) 214; Ex p. Means, 97 S. E. 39; West Chester v. James, 2 Watts & S. (Pa.) 568; Yerkes v. Stetson, 13 Pa. Dist. 696; Mintger's Estate, 2 Pa. Dist. 584; Com. v. Thatcher, 38 Pa. Co. 137; Cannon's Estate, 15 Pa. Co. 312; Foly's Estate, 11 Phila. 47; Farris v. Sipes, 99 Tenn. 298, 41 S. W. 443; Lanning v. Gregory, 100 Tex. 310, 315, 99 S. W. 542; Wheeler v. Hollis, 19 Tex. 522; 33 Tex. 512; Rusell v. Randolph, 11 Texas 460; Udny v. Udny, L. R. 1 H. L. Sc. 441; Sharpe v. Crispin, L. R. 1 P. 611; D'Etchegoyen v. D'Etchegoyen, 13 P. D. 132; Firebrace v. Firebrace, 4 P. D. 63; In re Beaumont (1893), 3 Ch. 490; In re Macreight, 30 Ch. D. 165; In re Goodman, 17 Ch. D. 266; Goulder v. Goulder (1892), P. 240; Walcott v. Bottfield, Kay 534; Potinger v. Wightman, 3 Meriv. 67; In re Duleep Sigh, 7 Morr. Bank. Cas. 228; Somerville v. Somerville, 5 Ves. Jr. 750; 31 Reprint 839.

(18) Jefferson v. Washington, 19 Me. 293, 300; Dean v. Cannon, 37 W. Va. 123, 127, 16 S. E. 444; Burrill v. Jewett, 25 N. Y. Super. 701.

(19) 9 Central L. Journal 4, 8, 11.

(20) Lewis v. Castelo, 17 Mo. A. 593; Nunn v. Robertson, 80 Ark. 350, 97 S. W. 293; In re Willett, 24 N. Y. S. 506; Kelley v. Garrett, 67 Ala. 304; Ex p. McCoun, 96 Kan. 314; Matter of Rice, 7 Daly (N. Y.) 22; Shirley v. Burch, 6 Ky. Law (Abstract) 445; Douglas v. Douglas, 12 Eq. 617; 10 E. R. C. 355; Wheeler v. Burrow, 18 Ind. 14; Stephens Succ., 19 La. Ann. 499; Yerkes v. Stetson, 13 Pa. Dist. 696.

(21) Kennedy v. Ryall, 67 N. Y. 379.

(22) Walcot v. Botfield, Kay 534 (semble).

(23) In re Vance, 92 Cal. 195, 28 P. 229; People v. Dewey, 50 N. Y. S. 1013; In re Rogers, 11 Oh. S. & C. P. 806.

(24) People v. Dewey, 50 N. Y. S. 1013.

(25) Charlestown v. Boston, 13 Mass. 469; Washington v. Beaver, 3 Watts & S. (Pa.) 548; Eisbon v. Lyman, 49 N. H. 553; N. Yarmouth v. Portland, 73 Me. 108; Russell v. State, 6 Neb. 512, 87 N. W. 344; Carthage v. Canton, 97 Me. 473, 54 A. 1104; Oglesby v. Turner, 127 La. 1093, 54 So. 400; Bjornquist v. B. & A R. R., 50 Fed. 929.

(26) Gulf C. & S. & F. & Ry. v. Lemons, 206 S. W. (Tex.) 75.

for the District of Eastern N. Y.,[27] which decided the matter the other way. It is submitted, with due deference, that these two last cases are wrongly decided. For, when the law releases a parent from his obligations toward a son, as his son, the powers which flow from the imposition of those obligations should also be cut off. The parent is under no duty to control the activities of the emancipated minor; the domicile of the minor is fixed for the purpose of maintaining such control; hence, there is no good reason why the domicile should be fixed by a person who cannot legally control the activities of the person whose domicile is in question. The purpose of the rule cannot be carried out; the rule, therefore, should not remain.

(c) The authorities are not agreed on the rule governing the domicile of a married minor. Dicey says: "It has been suggested[28] that a man, though a minor, may possibly acquire a domicile for himself by marriage, or by setting up an independent household. The reason for this suggested exception to the general rule is that a married minor must be treated as sui juris in respect of domicile, since on his marriage he actually founds an establishment separate from the parental home. This reason must, if valid, extend to all cases in which a minor in fact acquires an independent domicile, and is not satisfactory. It involves some confusion between domicile and residence, and derives no support from the view taken by English law as to an infant's liability on his contracts, which is in no way affected by his marriage. The reasoning, therefore, by which the suggested exception is supported may be held unsound, and the existence of the exception itself is deemed open to the gravest doubt."[29]

(27) D. L. & W. R. R. v. Petrowsky, 250 Fed. 554.

(28) Conflict of Laws, Page 128, Rule 10 (2). Mr. Dicey refers to Savigny, Guthries Tr. 2nd M Ed., S. 553, p. 100. Stephens v. MacFarland, 8 Ir. Rep. 444.

(29) Dicey, Ibid., page 129.

Westlake says: "If it is asked whether the condition of full age is necessary in the case of those who have been emancipated by marriage, the answer must be that this must depend on the personal law. A minor who on marriage is relieved by the law of his country from all incapacity will, of course, be capable for the purpose of changing his domicile as for any other purpose. Marriage does not by the law of England relieve a minor from all incapacity or therefore give him the power of changing his domicile."[30]

Jacobs follows Dicey and adds: "Certainly, unless we are prepared to hold that the place where a married man resides with his family is universally and necessarily the place of his domicile, there seems to be no good reason for attributing to a married minor the capacity to select for himself a domicile which is denied to an unmarried minor."[31]

Phillimore puts it thus: "It can scarcely be doubted that in Great Britain a minor once married with or without the proper consent, would be held capable of choosing his domicile."[32] Wharton says that the authorities are not clear, [32a] and Story does not mention the case at all. Perhaps, a consideration of the matter based upon the principles involved will help to clear up the difficulties.

We have seen above that an emancipated minor has a domicile of his own.[33] It is also well settled law that marriage emancipates a minor from the control of his or her parent.[34] In regard to a female in-

(30) Westlake, Private Internation, La., 4th Ed., par. 257, page 335.

(31) Jacobs, The Law of Domicile, par. 232, page 324.

(32) Philimore, Domicile, p. 50, n. 91; Int. Law, Vol. 4, No. 126.

(32A) Wharton, Conflict of Laws, 3rd Ed., page 96.

(33) Note 25 supra.

(34) Aldrich v. Bennett, 63 N. H. 415; Dick v. Grisson, Freeman Ch. (Miss.) 428; Northfield v. Brookfield, 50 Vt. 62; Taunton v. Plymouth, 15 Mass. 203; Com. v. Graham, 31 N. E. (Mass.) 706; Craftsbury v. Greensboro, 29 A. (Vt.) 1024 Tiffany, Persons and Domestic Relations, page 261.

fant who married this was always so, and the rule went on the ground that on marriage the domicile of the husband was the domicile of the wife, and as every person can have but one domicile, the infant's domicile was necessarily detached from the domicile of the father and attached to the domicile of the husband. The more recent cases give a married woman a domicile of her own for practically all purposes,[35] and it would follow that marriage simply detaches the domicile of the female infant from that of her father and leaves her free to get and have a domicile of her own. We shall consider this more in detail when we discuss, later, the effect of a widow's second marriage upon the domicile of her infant son by a first marriage.

Aside from the logical result which follows from the emancipation of a male infant by marriage, a male minor should have the power to change his domicile, when he marries, because if such power is denied him you get some very odd results when the minor has a child born to him before he attains his majority. Take this case as an example.

A, a minor male, aged 18, marries, with the consent of his father. A year later his wife gives birth to a child. Eighteen months later his wife gives birth to another child. This represents the average modern family. This then is the situation as to domicile. A fixes the domicile of his wife and also of his minor children. That is, A has no capacity to fix his own legal home, but he can fix the legal home of others; he cannot be considered as having mind enough to determine where the law is to look for him, but he has mind enough to say where the law should look for others; he is too immature to be given powers of self-control, but he is mature enough to be given the control of others; he cannot by his acts and intentions fix his own duties, liabilities and powers, but he can by these same acts fix the rights, duties and powers of others. And, if we assume that his wife had attained her majority before marriage, A is unable to fix his own domicile, that of an infant, but he can, qua infant, fix the domicile of an adult.

Now look at the same case from another angle. F, the father of A, fixes the domicile of A. A fixes the domicile of W, his wife, and C, his children. When, therefore, F changes the domicile of A, he also, for all practical purposes, changes the domicile of W and C. That is, the domicile of a married woman can be changed by her father-in-law while she is still under coverture and living with her husband, and the domicile of an infant can be changed by its grandfather while the infant is living with its father and mother, who still have legal custody and control of the child. There isn't a case which turns the married infant into such an automaton as that. It isn't sensible to assume that the law would be so foolish as all that. When a supposed principle of law leads to such absurd results, then it is safe to declare that the principle is not as it is supposed to be.

Five decided cases bearing on this matter are all that the writer has been able to find. The earliest is Scrimshire v. Scrimshire,[36] decided in 1752. This was a suit for the restitution of conjugal rights. H, aged 18, married W, aged 15, in France. The marriage was clandestinely performed. By the law of France a marriage between minors without the consent of their respective parents is null and void. Differences arose between H and W, and H went to England. W sues H, her husband, in England, asking for restitution of conjugal rights. H sets up as a defense that he was a minor when the marriage took place. It was held, that as the marriage was void at the place where it was performed, there was no marriage, and so the action could not be maintained in England. The Court said, *semble*, "A minor son is domiciled where his father lived until the son comes

(35) 91 Central L. Journal 4, 24.

(36) 2 Hagg. Consistory 395.

of age *or settles in another kingdom.*" (Italics mine.)

Trammel v. Trammel[37] was decided in Texas in 1857. F, a widower, died domiciled in Arkansas, leaving a minor son, S, to whom he willed all his property. S married at the age of 18 or 20, and went to Texas with his wife to live there. A question arose as to the proper sale of some of his property by the executor of his father's estate, and suit was brought concerning it in Texas. It was held that the marriage of S did not emancipate him. Wheeler, J., said: "It will be difficult, I apprehend, to maintain either upon principle or authority, that it (the marriage of a minor male) does have the effect to remove their civil disabilities; or that the minor in the case became thereby a person capable sui juris of changing his national domicile." (Page 417.)

The next case is an English one, decided in 1888. P was born in France of French parents. When he was 10 years old his parents came to England and were naturalized and took their domicile there. At the age of 18, P went to Canada and married there. Later he returned to England. Leaving his wife in England, P travels and then returns to England. He then sues his wife in England for divorce, alleging adultery. The wife pleads to the jurisdiction of the court on the ground that P was domiciled in Canada. It was held that as P had gone to Canada only temporarily he was domiciled in England. The question as to a married minor being able to acquire a separate domicile from that of his father was not decided as the case went off on the point mentioned above.[38]

Goulder v. Goulder[39] was decided in 1892. X, a son of parents domiciled in England, was born in France and lived with his parents there. While under age he married in France. When he attained majority, X went through the formalities required by French law to indicate that he was a British subject and did not intend to make his home permanently in France. Shortly after this X went to Australia, where he committed adultery. His wife sues for divorce in England. It was held that the English court had jurisdiction, for the wife took her domicile from her husband, and as he had a domicile of origin in England which he had never changed by acquiring another domicile, the parties were both domiciled in England. The question as to the effect of the marriage upon the domicile of the minor was not discussed or decided.

In Hess v. Kimble,[40] a case involving the annulment of a marriage between minors, the court went off on a point respecting the bona fide residence of the minor and did not decide the question of the domicile of a married minor. The facts were as follows: H, a male minor, and K, a female minor, ran off to New Jersey from their respective homes in Philadelphia, and were married. His parents refused to recognize his wife, and sent him off to New Jersey to board. In New Jersey, H petitions to have the marriage annulled. It was held that the court had no jurisdiction. The court said that the domicile of a legitimate, unemancipated minor was with his father; and that H was not a bona fide resident of New Jersey under the New Jersey Statutes. The case was decided in 1913.

So far as the cases go then, there is one case squarely deciding that a married minor cannot change his domicile nor have one of his own, and there is a dictum to the effect that he can get a domicile of his own by settling in a foreign kingdom. On principle I think that marriage does emancipate a minor and so gives the married minor the power to acquire a domicile of his own.

ALBERT LEVITT.

Washington, D. C.

(37) 20 Texas 406.
(38) D'Etchegoyen v. D'Etchegoyen, 13 P. D. 132.
(39) XXX (1892) P. 240.
(40) 79 H. J. Eq. 454, 81 A. 363.

CARRIER OF PASSENGERS—BEGINNING OF RELATIONS.

LAVANDER v. CHICAGO CITY RY. CO.

(129 N. E. 757)

Supreme Court of Illinois, Feb. 15, 1921

Premature starting of street car was negligence as to person in the act of boarding it when it was started, such person being a passenger, but was not negligence as to person who was not in the act of boarding the car but was merely approaching it for that purpose when the car started, such person not being a passenger.

STONE, J. Defendant in error brought an action in tort against plaintiffs in error, the Chicago City Railway Company and the Chicago Railways Company, in the circuit court of Cook county, to recover damages for injuries alleged to have been received on June 25, 1916, by reason of a fall which she received while attempting to board a street car at the intersection of Paulina and West Madison street, in the city of Chicago. The declaration consists of two counts. The first count, after alleging the ownership and operation of the street car, alleges that while the street car had stopped at the intersection of said streets for the reception of passengers, and while plaintiff was endeavoring to board the car as a passenger, using ordinary care for her own safety, the defendants, by their employees, negligently caused the street car to be suddenly and violently started, and thereby she was thrown to the street and injured. The second count is similar to the first, except that it charges that while the car was stopped and the plaintiff was in the act of boarding the car, using ordinary care for her own safety, the defendants failed to afford her a reasonable opportunity, and by reason of their negligence in the operation of the car the plaintiff was thrown to the street and injured. The plaintiffs in error filed a plea of general issue. The case was tried before a jury, which returned a verdict for the plaintiff for $2,000. An appeal was prayed to the Appellate Court, where the judgment was affirmed, and the cause comes here on writ of certiorari.

Plaintiffs in error assign as error the giving and refusal of certain instructions by the trial court. They contend that there was a sharp conflict in the evidence and that it was important and necessary that the instructions to the jury be free from error.

The plaintiff's evidence showed that she, a woman of about the age of 50 years, on the evening of the accident had attended church, and on her return homeward, about 10:30 p. m., she stopped at Paulina and West Madison streets for the purpose of taking a northbound street car; that when she reached the intersection she crossed first to the southwest corner, and seeing a north-bound car she proceeded to Paulina street, on which street the car was being operated, in order to board the same. In doing so she passed to the rear of the northbound car. Her evidence tends to establish that she passed around the rear of the car to the east side of the rear platform and to the center of the entrance, where she waited for five people who were in front of her to get on; that four of them boarded the car and the fifth stepped to the right and assisted her onto the step; that she took hold of the righthand bar with her right hand and placed her right foot on the step and her left foot on the platform; and that as she was in the act of pulling herself into the car it started with a jerk throwing her onto the street. There is other testimony tending to corroborate her. Defendant's theory is that the car remained standing until every one who was waiting had boarded the car; that the conductor looked out and saw that no one else was attempting to get on the step, whereupon he signalled and the car started slowly and smoothly; that the plaintiff was still coming around the rear of the car and had not gotten around to the step when the car started to move away, and she hastened and reached for the rear hand bar, and that when she got hold of it she fell.

The defendant in error in support of her testimony called a man and his nine year old daughter, who were alighting from the front platform. The testimony of these witnesses tended to corroborate the theory of the defendant in error. Plaintiffs in error offered the testimony of six witnesses, two of whom were standing on the curb near the platform and four of whom were on the rear platform. The testimony of these witnesses tended to corroborate the theory of the plaintiffs in error. Without reviewing in detail the evidence in the case, it is sufficient to say that the evidence was in sharp conflict as to how the injury occurred and as to whether or not the defendant in error was in the act of boarding the car at the time the same started. It is necessary in such condition of the record that the instructions to the jury be free from error. Chicago & Eastern Illinois Railroad Co. v.

Donworth, 203 Ill. 192, 67 N. E. 797; Chicago & Alton Railroad Co. v. Kelly, 210 Ill. 449, 71 N. E. 355; Perkins v. Knisely, 204 Ill. 275, 68 N. E. 486.

The first count of the declaration charged that the defendant in error was a passenger on the car when the same was negligently started up by plaintiffs in error. If defendant in error was in the act of boarding the car when it was started up it cannot be doubted that she was a passenger. Klinck v. Chicago City Railway Co., 262 Ill. 280, 104 N. E. 669, 52, L. R. A. (N. S.) 70, Ann. Cas. 1915B, 177. If she was on the street and was not in the act of boarding the car she was not a passenger and a sudden starting of the car could not be negligence as to her, as plaintiffs in error would owe her no duty as a passenger until she had become such. In this condition of the record the court instructed the jury, as a matter of law, that—

"It is the duty of a street car company to use the highest degree of care and caution consistent with the practical operation of its road and the mode of conveyance adopted, to provide for the safety and security of the plaintiff, Hannah Lavander, while she was a passenger."

Defendant in error, in support of her contention that the giving of the above instruction was not error, cites Hatcher v. Quincy Horse Railway Co., 272 Ill. 347, 111 N. E. 1005. That case was a suit to recover damages for a fall from a street car. The plaintiff claimed she had gotten onto the step leading to the platform when the car started and she was thrown to the pavement. The defendant claimed that the plaintiff had gone onto the platform to see if a lady friend was on the car, and, not finding her, had attempted to alight from the car when the same was in motion and thereby injured. The defendant objected to an instruction telling the jury that it was the duty of the defendant, so far as consistent with the practical operation of its road, to exercise the highest degree of care and caution for the safety of the plaintiff while she was a passenger. The only objection urged to the instruction was that it omitted the qualification relating to the manner and mode of conveyance adopted. The court decided this objection by saying that practically the same instruction had been given and approved in Chicago City Railway Co. v. Pural, 224 Ill. 324, 79 N. E. 686; West Chicago Street Railroad Co. v. Kromshinsky, 185 Ill. 92, 56 N. E. 1110; and West Chicago Street Railroad Co. v. Johnson, 180 Ill. 285, 54 N. E. 334. Examination of these cases shows that in all of them the plaintiff was admittedly a passenger on the car, and that question was therefore not in the case. In the Hatcher Case it is evident that the question as to the plaintiff being a passenger was not disputed or argued, and the instruction was not objected to on the ground that that was a controverted question. In that case the theory of the defense was that the plaintiff was negligent in attempting to alight from the car while the same was in motion. That case is to be distinguished from the one at bar, where one of the issues of fact sharply contested whether or not the defendant in error was a passenger.

The case of Klinck v. Chicago City Railway Co., supra, lays down the rule that, while it is necessary to prove either an express or implied contract of carriage between the carrier and the alleged passenger, yet the act of the carrier in stopping its street car, or in bringing it almost to a stop, at a place where it is accustomed to receive and discharge passengers, is an implied invitation to persons intending to take passage thereon at that place to board the car, and the act of any such person in boarding the car is an acceptance of such implied invitation and creates the relation of carrier and passenger. In that case it was held that, as plaintiff was injured while in the act of boarding the car, he was a passenger. That case is to be distinguished from the case at bar, in that there was no question in that case, as there is here, as to whether or not the plaintiff was in the act of boarding the car when it was started.

In Chicago Union Station Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341, a schoolboy was injured while attempting to board a street car in motion. The question whether he was a passenger was controverted. There was evidence in the record tending to show that the car had slowed down in order to give him an opportunity to board it and that he was injured while attempting to do so. The court in that case gave the following instruction:

"The fact that the law does not make a common carrier an insurer of the safety of its passengers does not, even to the slightest extent, relieve such common carrier of its legal duty to exercise the highest degree of care for the safety of its passengers consistent with the practical operation of its vehicle."

The objection to this instruction was that the evidence did not tend to prove that the plaintiff was a passenger and the declaration did not aver that he was. The instruction, however, was sustained on the ground that the declaration did so aver and that there was evidence tending to show that the plaintiff was a passenger. That instruction was a state-

ment of the law applicable to the case under the charge in the declaration and contained only the law as to the duty of a common carrier toward its passengers. The instruction in no wise instructed the jury that the plaintiff was a passenger. In the instant case the instruction assumes that the plaintiff was a passenger. This was one of the controverted issues of fact and one on which the evidence was sharply conflicting. Such an instruction, therefore, was an invasion of the providence of the jury, and the giving of it was reversible error. If the plaintiff was in the act of boarding the car at the time the same was started she was a passenger, and was entitled to that degree of care on the part of the plaintiffs in error which that relation called for. If she was not in the act of boarding the car, but was approaching it for that purpose when the car started, she was not a passenger, and the sudden starting of the car, if it was so started, could not be negligence as to her. It will be seen, therefore, that under this controverted issue of fact the instruction of the court assuming that she was a pasenger was highly prejudicial.

Plaintiffs in error complain of the giving and refusal of other instructions. On examination of them, however, we are not of the opinion that the action of the court regarding them was such as to constitute reversible error.

For the error in giving the instruction referred to, the judgments of the Appellate and Circuit courts will be reversed and the cause remanded to the circuit court for a new trial.

Reversed and remanded.

NOTE—*When Relation of Carrier by Street Car and Passenger Commences.*—By stopping its car, on the signal of a person desiring to take passage thereon, at a point where it is required to receive passengers, a street car company extends an invitation to him to become a passenger and he has a right to enter, and as soon as he steps upon the running board or steps of the car he becomes a passenger, and the company is bound to treat him as such. Creely v. Louisville & So. Ind. Tr. Co., 53 Ind. App. 659, 102 N. E. 455.

A person who stands upon the station platform of a suburban electric railway, and signals an approaching car to stop in order that she may take passage, is in the railway company's constructive care, and sustains to it the relation of passenger. Great Falls & O. D. R. Co. v. Hammerly, 40 App. D. C. 196.

When the car is brought to a stop or almost to a stop, the act of the person in attempting to board the car is an acceptance of the implied invitation to become a passenger, and creates the relation of carrier and passenger, and the carrier cannot escape liability on the ground that its servants did not know that the implied invitation had been accepted, as it is their duty to know that fact under the circumstances. Klinck v. Chicago City Ry. Co., 262 Ill. 280, 104 N. E. 669, 52 L. R. A. (N. S.) 70, Ann. Cas. 1915B 177.

Where plaintiff signaled a car in a street bounding an unimproved tract of city property, and the motorman replied with a nod and a slackening of speed, and, while the car was moving not more than two miles an hour, plaintiff put one foot on the step, seized a handrail with one hand, and was about to grasp another handrail with the other hand, when the car suddenly increased its speed with such a jerk that his hold was broken and he fell beneath the wheels, it was held that a verdict based on the theory that he had become a passenger was justified. Nolan v. Metropolitan St. R. Co., 250 Mo. 602, 157 S. W. 637.

Where the carrier stopped its car and opened its doors for passengers to enter, the plaintiff in endeavoring to enter created the relation of passenger and carrier, although she was only close to the car and about to step up, when the doors were closed and the car started, and a projecting part of the car struck her arm. Philadelphia Rapid Tr. Co. v. Alcorn, 266 Fed. 50

Evidence that the plaintiff, desiring to become a passenger, signaled an open car; that, the motorman having inclined his head in response, he started from the sidewalk, and when the car stopped boarded it with the knowledge of the conductor, and that plaintiff had reached and stood upon the running board on his way to a seat when the accident happened, was held sufficient to justify a finding that plaintiff was a passenger. Lockwood v. Boston Elevated R. Co., 200 Mass. 537, 86 N. E. 934, 22 L. R. A. (N. S.) 488.

Where the plaintiff testified that she had stepped on the first step of the car before the gates were closed and was in the act of taking the next step when the car started, it was held that the jury would have been justified in finding that she was a passenger. Dunn v. Puget Sound T., L. & P. Co., 89 Wash. 36, 153 Pac. 1059.

Generally on this subject see Duchemin v. Boston El. Ry. Co., 186 Mass. 353, 71 N. E. 780, 66 L. R. A. 980, 104 Am. St. Rep. 580, and note, 1 Ann. Cas. 603; Schepers v. Union Depot R. Co., 126 Mo. 665, 29 S. W. 712; Zurcher v. Portland R., L. & P. Co., 64 Oreg. 217, 129 Pac. 126; Nilson v. Oakland Tr. Co., 10 Cal. App. 103, 101 Pac. 413; Citizens' R. Co. v. Farley, Tex. Civ. App., 136 S. W. 94.

HUMOR OF THE LAW.

Guide: "This wonderful redwood tree has taken centuries to grow to its present size."

Tourist: "No wonder. It's on a Government reservation."—*Cartoons Magazine.*

"What do you make of all these war taxes?"

"I'm beginning to think when I went off to the war I must have told them to charge it to me."—*American Legion Weekly.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Attorney and Client**—High Cost of Living.—In determining compensation for an attorney, high cost of living and diminished purchasing power of dollar at the time, and the increased expense of maintaining a lawyer's office, must be taken into consideration.—In re Plimpton's Estate, N. Y., 186 N. Y. S. 257.

2. **Bankruptcy**—Contract Requiring Insurance of Property Construed.—Bankrupts acquired a sawmill under a contract requiring the buyer to maintain insurance, in not less than $4,000, on the mill, loss, if any, payable to the seller as its interest might appear. Bankrupts obtained $7,000 of insurance, sending the policies to seller, which agreed that in case of loss it should receive $4,000, as its share of the insurance. Afterward bankrupts secured $2,000 additional insurance under similar policies. Held, the mill having been burned, that bankrupts, or their trustee, were entitled to all the insurance above $4,000.—Walton Land & Timber Co. v. Runyan, U. S. C. C. A., 269 Fed. 130.

3.——Reference.—Mere apprehension or even ground of suspicion on the part of the creditor that debtor making payment to him is insolvent is not the equivalent of good cause to believe him to be insolvent, so as to render the payment a preference within the meaning of the federal Bankruptcy Act (U. S. Comp. St. §§ 9585-9656).—Mantz v. Capital City State Bank, Iowa, 181 N. W. 3.

4. **Banks and Banking**—"Doing Business in This State."—The words "doing business in this state," in the first and second lines in Acts Ark. 1913, No. 113, § 36, providing that the stockholders of every bank doing business in such state should be held individually responsible equally and ratably, and not one for another, for all contracts, debts, and engagements of the bank, refer to "bank," and not to the individual "stockholders."—Maxwell v. Thompson, N. Y., 186 N. Y. S. 208.

5. **Beneficial Associations**—Remedy.—Postponement of a meeting of a supreme lodge of a fraternal beneficiary association on account of an epidemic held not to destroy a member's remedy by appeal to that body, nor to justify a resort to equity.—Pixley v. Cleaver, Neb. 181 N. W. 138

6. **Bills and Notes**—Validity.—A renewal note depends upon the original note for its validity whether it is specified as a renewal note or not.—First Nat. Bank of Ann Arbor v. Holmes, Mich. 181 N. W. 46.

7. **Brokers**—Bankruptcy of Company.—A broker, employed to sell the property of a telephone company, who negotiated a sale, which could not be carried through because of legal obstacles, held not entitled to a commission because, after the bankruptcy of the company and a sale of the property by the trustee, the proposed buyer secured it from the purchasers, who were officers of the company, where it appeared that the bankruptcy and sale were bona fide, and not a subterfuge to avoid paying the commission.—Bailey v. Mississippi Home Telephone Co., U. S. C. C. A. 269, Fed. 125.

8.——Commission.—Under Civ. Code 1910, § 3587, providing that a broker's commissions are earned when he finds a purchaser ready, able, and willing to buy and who actually offers to buy on the owner's terms, the commissions are earned when a purchaser is found and the owner is notified, though the prospective purchaser is not brought into the actual presence of the owner and no contract of sale binding alike on the seller and purchaser has been made.—Wilnot & Cosby v. Silverman, Ga. 105 S. E. 654.

9. **Carriers of Goods**—Bill of Lading.—Carrier's admission through bill of lading that it had received "one case clo. (clothes)" did not amount to an admission they had received a certain number of knee pants of a fixed value, for which, on nondelivery, recovery could be had by consignor.—Dworkwitz v. New York Cent. R. Co., N. Y. 129 N. E. 650.

10.——Liability for Extra Freight Charge.—If a shipment miscarried as the result of the plaintiff's fault or negligence in giving shipping directions, or in erroneously marking the packages, the shipper is liable for the extra freight charges for transporting the goods from the erroneous destination to the true destination, and cannot recover for detention of the goods by the carrier.—Louisville & N. R. Co. v. James, Ala. 86 So. 906.

11.——Recovery of Rate on Goods Which Whisky Shipment Purported to Be.—Where packages containing whisky and marked and described as "roofing pitch" are delivered by consignor in Ohio and Kentucky to a carrier to be transported to named consignees in Georgia, and their real character is fully concealed from the carrier, and they are received and transported by the carrier without knowledge of their contents and without any circumstance that would put the carrier on notice or inquiry as to their real character, the right to sue for and recover the rate of freight for roofing pitch would arise.—Clemons v. Payne, Ga. 105 S. E. 623.

12. **Carriers of Live Stock**—Negligence.—In an action against a carrier, for damages sustained in a live stock shipment, where there is evidence in the record that milch cows were shipped in good condition, and where, although shipment was made under a live stock contract which provided for an attendant to accompany the cows, nevertheless, there is evidence in the record from which the jury might find that the company became aware that the cows were not attended, and thereupon furnished feed, care, and attention to such cows, it is held, pursuant to the findings of the jury, that the carrier thereupon assumed a duty and was liable for its negligence in the performance thereof.—Sailer v. United States Railway Administration et al, N. D. 181 N. W. 57.

13.——Reasonable Care.—Where the carrier knows that no one is accompanying live stock carried by it, it owes the duty of exercising reasonable care in feeding, watering, and shipping, and it is not relieved of that duty by a provision in the contract to the effect that the shipper will furnish one or more attendants.—Werner v. United States Railway Administration, N. D. 181, N. W. 81.

14.——Alighting.—Where a man with a cap and uniform, assisting passangers to alight, was not identified, it could not be presumed, merely from his presence there, that he was an employee of the carrier or acting for it.—Davidson v. Washington & O. D. Ry., Va. 105 S. E. 669.

15.——Continuous Ride.—A franchise given an interurban line by a township board, providing that passengers were entitled for five cents to a continuous ride from the township through another township "to Genessee avenue, in Saginaw," held not to give passengers a right to go to any particular place on Genessee avenue, or to be transported along such avenue after it was reached.—Zilwaukee Tp. v. Saginaw Bay City Ry. Co., Mich. 181 N. W. 37.

16.——Duty to passengers.—A carrier of passengers must use that high degree of care and skill which very cautious persons generally use under such circumstances to prevent injury to passengers on trains; and this pertains, not only to construction of roadbed, tracks, equipment, and appliances, but to the examination and maintenance thereof.—Tex. 227 S. W. 339.

17.——Negligence.—Some space is necessary between a subway station and car platforms to provide for swaying of cars, and the company was not bound to anticipate that the foot of an adult person, weighing about 170 pounds, would go into a space 3 or 3½ inches wide at a place where it was not shown that a large number of people were likely to congregate within a minute's time, as they did on the occasion in question.—McKinney v. New York Consol. R. Co., N. Y. 129 N. E. 652.

18. **Commerce**—Arbitration and Award.—Where a contract between a domestic corporation and a Japanese corporation provided for arbitration at New York in case of differences between the parties, General Corporation Law, § 15, held not applicable; the contract being one in the course of commerce with foreign nations, under Const. U. S. art. 1, §8, and it being beyond the power of a state so to restrict the right of a foreign corporation to sue in its courts for the enforcement of rights arising out of such a contract.—In re Shima & Co., N. Y. 186 N. Y. S. 154.

19.——"Interstate Commerce."—A railroad employee, who, when injured, was engaged in inspecting and repairing cars in a yard, some of which cars were being prepared for use in interstate and some in intrastate commerce, held employed in "interstate commerce," within the meaning of Employers Liability Act, § 1.—Hines v. Logan, U. S. C. C. A. 269 Fed. 105.

20. **Constitutional Law**—Due Process of Law.—An ordinance fixing water rates which would result in only 1.27 per cent. interest on the capital investment held in violation of the federal and state Constitutions, prohibiting the taking of private property for public use without due compensation and without due process of law.—Union Hollywood Water Co. v. City of Los Angeles, Cal. 195 Pac. 55.

21.——Equal Protection.—Laws 1920, c. 94[illegible] which deprived landlords of the remedy of summary proceedings against their tenants, but which was construed as continuing the remedy of ejectment, held not invalid as denying landlords equal protection of the laws.—People v. La Fetra, N. Y. 186 N. Y. S. 58.

22.——Unreasonable Rent.—In view of the existing emergency, causing a serious shortage of housing accommodations and a collective monopoly of such accommodations, and the fact that landlords were quite generally taking advantage of tenants, laws 1920, c. 136, making it a defense to an action for rent that the rent is unjust and unreasonable, and the agreement therefor oppressive, and so much of chapter 944 as re-enacts such provision, are valid, and do not violate Const. art. 1, § 6, forbidding the taking of private property for public use without just compensation, and the taking of property without due process of law, or Const. U. S. Amend. 14, prohibiting the taking of property without due process of law.—Edgar A. Levy Leasing Co. v. Siegel, N. Y. 186 N. Y. S. 5.

23. **Corporations**—"Doing Business" in State.—A foreign corporation which had never gone beyond the promotion stage, and which had never done any business except to sell stock and to acquire through such sales some personal property, and which was in the process of liquidation, was not "doing business" in the state within Rev. St. 1911, arts. 1314, 1318, requiring foreign corporations to secure permit to "do business in this state" in order to maintain an action in any state court.—Peerless Fire Ins. Co. v. Barcus, Tex. 227 S. W. 368.

24.——Doing Business in State.—That brokers within the state are employed by a foreign corporation to distribute funds received by them from the proceeds of the sale of lumber, in payment for work done in cutting the timber and manufacturing the lumber in this state, does not constitute doing of business in the state within the meaning of Or. L. § 6908, requiring foreign corporations to comply with certain conditions before engaging in business within the state.—Major Creek Lumber Co. of Johnson, Ore. 195 Pac. 178.

25.——Illegal Issue of Stock.—Where the president and secretary of a corporation for profit issued stock in return for an oil lease, stock of another corporation, and future services, without the authority of its board of directors, as required by Rev. Code 1919 § 8775, on issuing stock for property, such stock is void and subject to cancellation.—Walton v. Standard Drilling Co., S. D. 181 N. W. 96.

26.——Right of Action.—A stockholder cannot maintain an individual action against an officer of the corporation for consequential damages for the improper diversion of corporate funds. The right of action is in the corporation. If the corporation is controlled by the guilty officer a stockholder may sue, but must bring his action in a representative capacity to have the funds restored to the corporation for the benefit of all the stockholders.—Seitz v. Michel, Minn., 181 N. W. 102.

27. **Dedication**—Public Use.—Before the public can obtain a prescriptive right to the use of a way over private property, the public use should be exclusive of the private rights of the owner.—Ala. 86 So. 907.

28. **Divorce**—Custody of Child.—A wife granted a divorce for the fault of the husband by a decree which reserved the right to make a permanent order as to the custody of a child two years old at a subsequent time did not forfeit her right to the child's custody by remarrying in another state without the court's permission under Code Supp. 1913, § 3181, obtaining a second divorce, and contracting a third marriage within a little over a year after the first divorce.—Farrell v. Farrell, Iowa 181 N. W. 12.

29. **Electricity**—Negligence.—Owner of steam shovel and servant working thereon had the right to move the shovel along a village street without notifying a power company of its intention, although it was necessary to hold up electric wires so that it might pass under.—Casualty Co. of America v. A. L. Swett Electric Light & Power Co., N. Y. 129 N. E. 653.

30. **Eminent Domain**—Public Use.—The proposed use of land taken for widening of a street was a "public use," and the question of the necessity for taking the land and making the improvement was within the discretion and jurisdiction of the village, limited only by the right of the superior court, on the village's petition to ascertain compensation, to prevent an abuse of the power.—Village of Glencoe v. Stone, Ill. 129 N. E. 700.

31.——Public Use.—To bring property within the immunity from condemnation under general legislative authority as having already been legally appropriated to a public use, it is not necessary that it have been acquired by eminent domain; if its owner has devoted it to a public use which he is under legal obligation to maintain, it comes within the protection of the rule.—Vermont Hydro-Electric Corporation v. Dunn, Vt. 112 Atl. 223.

32. **Estoppel**—Agreement With Railroad.—Where a company, which was not a valid corporation by reason of failure to pay bonus tax, entered into an agreement with a railroad to hold the railroad harmless for loss by fire in consideration for the location of a siding, and the property was taken over by its supposed stockholders and a new corporation organized to remedy the legal consequences of the failure to pay the bonus tax on the capital stock of the

original company and to vest title in the new corporation in the property, and such new corporation knew about the siding agreement and acted upon it, and received the benefits therefrom, it was estopped to deny the existence of such siding agreement.—Adamstown Canning & Supply Co. v. Baltimore & O. R. Co., Md. 112 Atl. 287.

33.——Executors and Administrators.—An agreement between an heir and the executors for payment of interest on an indebtedness to the estate held supported by a consideration consisting of the settlement of their differences as to the construction of the will and of a sale of an interest in the estate for less than its actual value.—Pickens v. Pickens, Neb. 181 N. W. 154.

34. **Food**—Police Power.—Laws 1915. p. 274, § 1, Subd. (c), requiring restaurants, cafes, hotels, bakeries, and confectioners using eggs from foreign countries to place conspicuous notice thereof where customers can read it, held within the police power of the state.—Parrott & Co. v. Benson, Wash. 194 Pac. 986.

35. **Frauds, Statute of**—Part Performance.—An estate for the life of a grantor, being a freehold estate equally with an estate for the life of the grantee, where a father offered to give his son use and possession of a farm if the son would give up his business, surrender his share in his deceased mother's estate, make improvements, etc., the taking possession of the farm by the son pursuant to the contract and making valuable improvements with the knowledge and consent of the father was sufficient part performance to take the case out of the statute of frauds.—Hoppes v. Hoppes, Ind. 129 N. E. 629.

36. **Highways**—Petitioners May Specify Kind Desired.—Under Laws 1913, p. 520, art. 6, subd. 8, as amended by Laws 1917, p. 710, those petitioning for an election for a vote for or against a tax for the purpose of constructing and maintaining hard roads have the right to select the kind of hard road which they desire, and to specify in their petition, and such specification cannot be rejected as surplusage; the amendment not eliminating the alternative provisions of the previous acts.—Martin v. Hart, Ill. 129 N. E. 693.

37.——Innkeepers Liability.—In a guest's action against an innkeeper for loss of money stolen by defendant's clerk, objection that defendant was negligent in not bonding his clerk is not well taken, in absence of proof that the bond would cover other than legal liability, on the question of limiting the recovery to $250, under General Business Law, § 200.—Davis v. Hotel Chelsea, N. Y. 186 N. Y. S. 75.

38. **Insurance**—Cancellation.—The authority of a broker or agent to keep property insured is not authority to receive notice of and consent to a cancellation of the insurance which would leave the property wholly without insurance, especially where the policy entitled insured to protection for ten days after notice of cancellation.—Lauman v. Springfield Fire & Marine Ins. Co., Cal. 195 Pac. 50.

39. **Death in Army**—Accidental Means.—The death of an insured, caused by his being struck by a piece of shrapnel from an exploded shell while engaged in battle as a soldier in the United States army, held to have resulted "from bodily injury sustained and effected directly through external, violent, and accidental means," within the terms of the policy.—State Life Ins. Co. v. Allison, U. S. C. C. A. 269 Fed. 93.

40.——Default of Treasurer.—Discovery by directors of trust company that treasurer had without authority discounted worthless notes, without notice to treasurer's sureties, held not, as a matter of law, a condonation of a default by treasurer, in violation of provision of bond, where sureties did not guarantee treasurer's skill, but merely his honesty, since the directors, instead of treating the transaction as a dishonest one, regarded it merely as an honest or mistaken excess of authority.—Guaranty Trust Co. v. United States Fidelity & Guaranty Co., N. H. 112 Atl. 247.

41.——Incriminating Testimony.—Where insured refused to testify on examination by insurer provided for by the policy on the ground that he had been charged with arson, and that he was protected by the Constitution against giving testimony that might be used in the arson trial, the insurer, to avail itself of such refusal to defeat payment of policy, was not required to make a new demand on insured for examination after the charge of arson had been dismissed, since insured was in default by refusal to submit on the first examination, and insurer was under no obligation to reopen the matter.—Hickman v. London Assur. Corporation, Cal. 1[illegible] Pac. 45.

42.——Right to Change Beneficiary.—The provision in a life insurance policy giving insured the right to change the beneficiary at will defeats the vested right which the beneficiar[illegible] would otherwise acquire upon the issuance and acceptance of the policy and which would prevent a change therein without her consent.—Bronson v. Northwestern Mutual Life Ins. Co., Ind. 129 N. E. 636.

43. **Intoxicating Liquors**—Joint Ownership.—Under Acts 1917, c. 4, § 4, making it unlawful to keep intoxicating liquor with intent to furnish or otherwise dispose of it, it was a violation of law for defendant to keep a jug of whisky purchased by him and another jointly, with intent to furnish whisky therefrom to the other owner as he called for it.—Ford v. State, Ind. 129 N. E. 625.

44.——Loss of Suit Case.—Where a person brings an action against a hotel for the loss of a suit case in which was a bottle of intoxicating liquor carried in violation of chapter 189, Laws 1918, it is no defense in such action that such liquor was carried therein in violation of the law, as to the value of the suit case, a suit case not being within the terms and purview of section 5 of that act, which undertakes to denude certain articles used in violation of law of property rights.—Edwards House v. Davis, Miss. 86 So. 849.

45.——State Law.—Congress, by the enactment of the Volstead Act, pursuant to the power conferred upon it by Const. U. S. Amend. 18, prohibiting the manufacture, sale, etc., of intoxicating liquors, did not take possession of the entire field of prohibition legislation, state as well as federal, so as to nullify the existing state law on the subject; any statute previously or subsequently enacted by the state creating or not creating state offenses would not be in conflict with the Volstead Act or the Eighteenth Amendment unless or only to the extent that it should attempt to nullify the federal law creating the federal offenses.—Allen v. Commonwealth, Va. 105 S. E. 589.

46.——Storage in Home.—Though the Prohibition Act does not prevent the keeping of liquors in a home for personal use, a person who makes his home in one of the places in which the possession of liquor is prohibited by section 7 of that act cannot keep liquor therein and thereby avoid the provision of the act.—Ex parte Cerfoglio, Nev. 195 Pac. 96.

47. **Master and Servant**—Anticipation of Injuries.—Where a railroad had no knowledge of throwing of a bottle from a train by a passenger that struck a section man in the face or of the passenger's intention to throw it, and no reason to anticipate such bottle would be thrown, the railroad was not negligent toward the section man in failing to prevent the throwing of the bottle.—Heed v. McDaniels, Ind. 129 N. E. 641.

48.——Course of Employment.—Injury to pump engineer attempting to restore broken electric wire cross-arm held one "arising out of and in course of employment" within Compensation Act.—Young v. Mississippi River Power Co., Iowa 180 N. W. 986.

49.——"Dependent" Defined.—The test as to dependence within Workmen's Compensation Act is whether the employee's contributions were relied upon by the dependent for his or her means of living, the class and position in life of the dependent being considered; and the fact that earnings were turned into a family fund and used as one of the sources of support of the family of the employee does not prove

that they were relied upon for living expenses. —Atwood v. Connecticut Light & Power Co., Conn. 112 Atl. 269.

50.——Employee's Forgery.—Where an instrument, complete in all particulars except those which an agent or employee is authorized to complete, is intrusted to that employee or left where he has access to it, the owner will be held liable for the acts of such employee in issuing the same; but where the instrument is not complete, and can only be made so by a criminal act of the employee, the owner will not be liable, as the criminal act, and not the act of the owner, is the proximate cause of the injury.—Ehrich v. Guaranty Trust Co., N. Y. 186 N. Y. S. 103.

51.——Employees of State.—Employees of the state and of its governmental agencies, when not engaged in an enterprise carried on for pecuniary gain or profit, are not within the operation of the workmen's compensation law.—Ray v. School Dist. of Lincoln, Neb. 181 N. W. 140.

52.——Hours of Service Act.—In Hours of Service Act, § 2 (Comp. St. § 8678), the language of the proviso, that no operator or train dispatcher shall be required or permitted to remain on duty for a longer period than 9 hours in any 24 hour period in offices or stations "continuously operated night and day does not mean stations continuously operating during the 24 hours, but includes stations operated at night and by day during the period of service of an operator, which may include a part of the day and a part of the night.—United States v. Boston & M. R. R., U. S. C. C. A. 269 Fed. 89.

53.——Loss of Compensation Waived.—A finding by the Industrial Accident Board that employer voluntarily paid the employe compensation for the full period of his refusal to accept the services of the employer's physician shows that the refusal lasted only until the payment ceased, so that the employer waived his right under Workmen's Compensation Act, § 25, to refuse compensation while such refusal continued by making the payments, and he cannot refuse thereafter to pay compensation for partial permanent disability because of the past refusal to accept the physician's services.—American Coal Mining Co. v. Decourcey, Ind. 129 N. E. 635.

54.——Right of Action.—Where an employer against whom a claim for compensation was made under the Workmen's Compensation Act of California has contested the claim and persistently denied that it had any interest in the claimant's right of action against a third party and has attempted to transfer any interest it may have to the claimant, it cannot bring another action against such third party and recover a judgment for damages.—Rorvik v. North Pacific Lumber Co., Ore. 195 Pac. 163.

55. **Mines and Minerals**—Termination of Lease.—Where lessor under oil lease was under obligation to give possession to lessee, who could not obtain it and begin operations solely by reason of an injunction in favor of other persons having an interest in the land, and the time within which lessee was to begin operations elapsed pending the injunction, the lease was not thereby terminated, in view of Civ. Code, art. 2040.—**Gulf Refining Co. of Louisiana** v. **Hayne, La. 86 So. 891.**

56. **Mortgages** — Constructive Notice — The filing of a release of a deed of trust by the trustee was constructive notice of the discharge of the trust deed to all parties in interest, without regard to what book it was recorded in, as the party filing it was not required by the statute to supervise its recordation.—Town of Carbon Hill v. Marks, Ala. 86 So. 903.

57. **Municipal Corporations** — Damnum Absque Injuria.—A borough having had legal right to open, grade, pave, and improve its streets within a drainage area, and the owners of abutting lots having had right to erect houses thereon, fill up depressions therein, and to change the grades to conform with the changed grades of the streets, damage to an adjoining borough on account of increasing the quantity and velocity of surface waters drained into its streets is damnum absque injuria, which such adjoining borough cannot restrain.—Borough of Bridgewater v. Borough of Beaver, Pa. 112 Atl. 232.

58.——Incurring Debt Without Levy of Tax Void.—A warrant evidencing an attempt by a city to incur a debt without at the same time complying with the constitutional provision requiring the levy of a tax to meet interest and sinking fund is absolutely void.—City of Aransas Pass v. Eureka Fire Hose Mfg. Co., Tex. 227 S. W. 330.

59. **Negligence**—Reasonable Care.—All persons having occasion to enter an office building on legitimate business have an implied invitation from the owner of the building for that purpose, and such owner owes a duty to all such persons to exercise reasonable care to provide a reasonably safe entrance, and such entrance, or the approach thereto, must be so constructed and maintained that visitors will not be liable to step into dangerous pitfalls by reason of misleading doors or deceptive landings.—Johnson v. Smith, Wash. 194 Pac. 997.

60. **Officers**—Failure to File Expense Account.—Although sections 8b (6) and 8b (8), chapter 5, Code 1918 (Code Supp. 1918, §§ 188f, 188h), exact promptness in the preparation and delivery of the expense account of every candidate for public office, the statute, when read and considered in its entirety, manifests no express or implied determination to disqualify permanently one who is tardy in that respect from discharging the functions and receiving the emoluments of the office to which he has been elected, but only until he has filed the required statements.—State v. Gilmer County Court, W. Va. 105 S. E. 693.

61. **Railroads**—Income Tax.—A lessee railroad which agrees to pay all "taxes, duties, and assessments" of every name and nature that may accrue or be assessed upon the demised railroad property and any receipts for transportation of persons and property on the demised railroad, and upon its business, by the state or national government, and to pay all taxes assessed or charged to the lessor by state or national authorities upon its bonds or capital stock, is not required to pay the income tax levied under Act Cong. Oct. 3, 1917.—Sharon Ry. Co. v. Erie R. Co., Pa. 112 Atl. 242.

62.——Presumption of Negligence.—It being shown that the fire which destroyed plaintiff's barn was caused by sparks from defendant railroad's locomotive, the presumption is that the spark arrester on the locomotive was either not in repair or not efficient.—Luikart v. Yazoo & M. V. R. Co., La. 86 So. 894.

63.——Speed Not Negligence.—In the absence of statutory regulations or special circumstances, a railroad company may run its trains at any speed without being chargeable with negligence.—Panhandle & S. F. Ry. Co. v. Haywood, Tex. 227 S. W. 347.

64. **Sales**—Implied Warranty.—Where, in defense to a suit against the maker of a purchase-money note which does not purport to contain the terms of sale, a plea of total failure of consideration is entered, in which a breach of contemporaneous express representations and warranties governing the transaction are set up, and the defendant introduces evidence in support of the plea, it is not improper for the trial judge to charge the law governing the breach of express warranties, since an express warranty excludes implied warranties.—Thompson v. Cordele Motor Car Co., Ga. 105 S. E. 620.

65.——Instructions to Jury.—Where a contract for the sale of lumber fixed the place of delivery on a public highway and the evidence of the plaintiff shows it was delivered on said highway at the place agreed on, and the evidence of the defendant shows that a less amount was received at its yard where it was checked and measured, it was error for the court to instruct the jury orally that the sale question was whether the lumber was received at the yard of defendant, or actually received by its hauler and not delivered to the defendant.—Gilmore Puckett Co. v. Glenn, **Miss. 86 So. 864.**